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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 396

HARRY KIRK CREAMER,

Petitioner,

vs.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY, A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

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INDEX

Subject Index

	Page
Petition for Writ of Certiorari	1
Summary and Short Statement of Matter Involved	1
Jurisdictional Statement	3
Questions Presented	3
Reasons Relied on for Allowance of Writ	4
Prayer for Writ	5
Brief in support of Petition	6
Opinion of Courts Below	6
Grounds on which jurisdiction of Supreme Court of the United States is Invoked	6
Statement of the Case	6
Specifications of Error	10
Argument	11
Point I. The Utah Supreme Court committed prejudicial and reversible error in denying to petitioner a jury trial by setting aside a jury verdict for petitioner and directing that judgment be entered for respondent	11
Point II. The Utah Supreme Court committed prejudicial and reversible error in holding that there was no evidentiary basis to support a jury finding of negligence by respondent in failing to furnish sufficient equipment to perform the job of icing diners	13
Point III. The evidence presents an evidentiary basis to support a finding of causal relation between respondent's negligence and petitioner's injury	19
Conclusion	21

Table of Cases Cited

Anderson v. *Atchison, Topeka & Santa Fe Ry. Co.*, 333 U.S. 821, 68 S. Ct. 854, 92 L. Ed. 1108	3

Page

Bailey v. *Central Vermont Ry. Co.*, 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 ..... 2, 11
Blair v. *Baltimore & O. R. Co.*, 323 U.S. 600, 65 S. Ct. 545, 89 L. Ed. 490 18
Boston & M. R. R. v. *Kyle*, 156 F. 2d 112 ..... 3, 15
Boston & M. R. R. v. *Meech*, 156 F. 2d 109, (cert. den. 329 U.S. 763, 67 S. Ct. 124, 91 L. Ed. 658) 3, 15
Brady v. *Southern R. C.*, 320 U.S. 476, 64 S. Ct. 232, 88 L. Ed. 239 20
Coray v. *Southern Pacific Co.*, 335 U.S. 520, 69 S. Ct. 275, 93 L. Ed. 208 ..... 5, 20
Ellis v. *Union Pac. R. Co.*, 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572 2
Lavendar v. *Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 ..... 2, 12
Lillie v. *Thompson*, 332 U.S. 459, 68 S. Ct. 140, 92 L. Ed. 73 3
Pauly v. *McCarthy*, 330 U.S. 802, 67 S. Ct. 962, 91 L. Ed. 1261 ..... 2, 5
Stewart v. *Baltimore & O. R. Co.*, 137 F. 2d 527 ..... 3, 16
Tennant v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520 ..... 2, 20
Tiller v. *Atlantic Coast Line R. Co.*, 318 U.S. 554, 63 S. Ct. 444, 87 L. Ed. 610 2
Tiller v. *Atlantic Coast Line R. Co.*, 323 U.S. 574, 65 S. Ct. 421, 89 L. Ed. 465 2
Urie v. *Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 ..... 3, 21
Virginian Ry. Co. v. *Staton*, 84 F. 2d 133 18
Wilkerson v. *McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 ..... 3, 5
Williams v. *Atlantic Coast Line R. Co.*, 190 F. 2d 744 16

STATUTES CITED

28 U.S.C.A., Section 1257 (3) 3, 6
45 U.S.C.A., Sections 51, et seq. 3, 6, 14

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vs.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY, A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

The petition of Harry Kirk Creamer respectfully shows:

Summary and Short Statement of Matter Involved

The Supreme Court of Utah in a case arising under the Federal Employers' Liability Act denied petitioner his right of trial by jury in a case where the evidence clearly demonstrated that respondent failed to exercise reasonable care to furnish petitioner, its employee, reasonably safe, sufficient and adequate equipment with which to perform the duties of his employment when there was reasonably safe, sufficient and adequate equipment which respondent

could have readily made available for the performance of petitioner's duties. Lack of such equipment caused petitioner to overexert himself thereby precipitating a heart failure, causing permanent injury to petitioner.

The trial court submitted the issues of the case to a jury of eight Utah citizens. The jury returned a unanimous verdict awarding petitioner damages in the sum of $15,000.00. The trial court denied respondent's motions to set aside the verdict and for a new trial.

The Utah Supreme Court reversed the judgment for petitioner and ordered that judgment be entered in favor of the respondent. The said court held as matter of law that the respondent could not be found negligent in a situation where it furnished equipment requiring extreme exertion by its employees in carrying large quantities of ice manually up a 15 foot, 15 rung ladder when there was readily available equipment which would eliminate this exertion on their part and with which this ice could be mechanically lifted to the top of the cars. The exertion required of petitioner by this work caused a failure of petitioner's rheumatic heart which had theretofore caused him no trouble of any kind and was unknown to him. The overexertion so caused contributed to cause, in fact precipitated, permanent injury to petitioner's heart.

Petitioner contends that in reaching this result the Utah court ruled contrary to the principles of law announced by this Court in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465; *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572; *Pauly* v. *McCarthy*, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed.

1261; *Wilkerson* v. *McCarthy,* 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; *Urie* v. *Thompson,* 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282; *Lillie* v. *Thompson,* 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 73; and *Anderson* v. *Atchison, Topeka and Santa Fe Ry. Co.,* 68 S. Ct. 854, 333 U. S. 821, 92 L. Ed. 1108.

Such ruling is also contrary to the principles announced by United States Circuit Courts of Appeal in *Boston & M. R. R.* v. *Meech,* 156 F. 2d 109 (cert. den., 67 S. Ct. 124), *Boston & M. R. R.* v. *Kyle,* 156 F. 2d. 112, *Stewart* v. *Baltimore & O. R. Co.,* 137 F. 2d 527.

Jurisdictional Statement

(a) Jurisdiction to grant this petition is sustained by Section 1257 (3), Title 28, U. S. C. A.

(b) The statutes of the United States applied by the Supreme Court of Utah are 45 U. S. C. A., Sections 51, et seq., known as the Federal Employers' Liability Act, material portions thereof being set forth in appendix hereto. The right of the petitioner is specially set up and claimed under said statute.

Questions Presented

The questions presented fundamentally involve a determination of whether or not the Supreme Court of Utah properly applied the United States statutes, commonly called the Federal Employers' Liability Act, or whether the application of that Act made by said court is inconsistent and in conflict with controlling decisions of the Supreme Court of the United States and decisions reflecting the Federal Courts' interpretation of the Federal Employers' Liability Act.

Specifically the questions presented are:

(1) Whether or not the Utah Supreme Court denied to the petitioner herein his right to a trial by jury granted, protected and made valuable by the Federal Employers'

Liability Act and the construction of that statute by this Court.

(2) Whether or not the evidence supplied an evidentiary basis to support a finding that respondent failed to exercise reasonable care in furnishing to petitioner and other employees sufficient equipment within the terms and provisions of the Federal Employers' Liability Act where the equipment furnished required extreme and unusual exertion and where there was readily available to the respondent equipment which would have eliminated the necessity of any overexertion by petitioner in performing the duties of his employment as a coach cleaner.

(3) Whether or not such failure to exercise reasonable care caused in whole or in part injuries to petitioner.

In deciding these questions the Utah Supreme Court has denied to petitioner his right to a trial by jury in a case where a jury selected to try the case has found that respondent was negligent in such a situation and that such negligence caused in whole or in part petitioner's injuries.

Reasons Relied On for Allowance of Writ

The Supreme Court of Utah has decided Federal questions of substance in a way not in accord with applicable decisions of this Court. It reversed a verdict and judgment in petitioner's favor and directed that a judgment be entered in favor of the respondent. This was an action brought under the Federal Employers' Liability Act where the evidence was clearly sufficient to supply an evidentiary basis for petitioner's cause. By its decision the Utah Court has usurped the functions of a jury, contrary to repeated admonitions of this Court, and has wrongfully deprived petitioner of his right to a jury trial guaranteed by the Constitution and arbitrarily set aside a jury verdict.

A granting of the Writ of Certiorari in this case will

afford this Court an opportunity to establish a proper rule and construction of the Federal Employers' Liability Act relating to the question of causation, a subject upon which, it is respectfully submitted, this Court has not given a clear and uniform rule to be followed by lower courts.

It is essential that a Writ be granted in order to determine important questions relating to the construction, interpretation and application of the Federal Employers' Liability Act. We respectfully submit that the Utah court has again given this Act the same type of limited, restrictive and hostile construction which has required this Court to reverse that court on three prior occasions. *Pauly* v. *McCarthy*, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261; *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 208; *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

Prayer

Wherefore, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Utah commanding said court to certify and send to this Court a transcript of the record in the case entitled Harry Kirk Creamer, plaintiff and respondent, v. The Ogden Union Railway and Depot Company, a corporation, defendant and appellant, Case No. 7664, including also the proceedings in said Supreme Court, to the end that said cause may be reviewed and determined by this Court and the judgment of the Utah Supreme Court reversed.

HARRY KIRK CREAMER,
Petitioner,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Courts Below

After a trial in the District Court in and for Weber County, State of Utah, the jury returned a verdict in favor of the petitioner in the sum of $15,000.00 on December 21, 1950 (R. 6) and judgment was entered on that verdict in said sum on the same day (R. 6). The trial court denied respondent's motion to set aside the verdict and its motion for a new trial (R. 9). The opinion of the Supreme Court of Utah reversing said judgment and ordering that judgment be entered in favor of the respondent is set forth at R. 67. It is not yet officially reported.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked

The judgment of the Supreme Court of Utah was rendered April 9, 1952 (R. 71). Petition for Rehearing was denied Jully 16, 1952 (R. 72). Petition for Writ of Certiorari was filed on October 14th, 1952. The judgment of the Supreme Court of Utah is based on its application of the United States statutes, commonly called the Federal Employers' Liability Act, 45 U.S.C.A., Sections 51 to 59. The jurisdiction of the Supreme Court of the United States is invoked under Section 1257 (3), Title 28, U.S.C.A.

Statement of the Case

The petitioner at the time of his injuries was 36 years of age (R. 20), 6 feet, 1½ inches tall and weighed 215 pounds (R. 17). He had spent his mature years at various forms of manual labor (R. 9). He had lived an active life, participating in such activities as hunting and fishing (R. 21). He had always enjoyed perfect health and had no

memory of any childhood rheumatic fever or other forms of heart ailment (R. 21).

Respondent employed petitioner on August 21, 1946, as a coach cleaner (R. 9). Petitioner passed a physical examination at that time (R. 9). See Exhibit 4 (R. 75). He continued to work as a coach cleaner until the date of his injury, August 11, 1949 (R. 9). The usual duties of a coach cleaner consisted of washing coaches, diners and mail cars, icing and supplying the coaches, cleaning the rest rooms, watering coaches and icing diners (R. 9, 10).

The most difficult job in the yard was the task of icing diners in the manner in which the respondent required that it be done (R. 10, 47). A good deal over 100 coach cleaners had, at various times, been subjected to the performance of this duty (R. 56).

To ice diners it was necessary to take ice to the top of the diner and there cut it into small pieces and place it in three holes provided for that purpose (R. 10, 11, 12). The only equipment which respondent furnished for this purpose was a 15-foot ladder (R. 12). Customarily the men would cut the ice into 100-pound cakes (R. 13). Experience had shown that this size was easier to handle. Smaller pieces would be more readily dropped and the number of trips up the ladder would be increased (R. 24, 41, 42). In carrying ice up the ladder at the place where the icing was performed it was necessary to avoid an overhanging canopy located over the track and this caused additional strain (R. 12, 13).

It would take between nine and eleven 300-pound blocks of ice to fill a diner (R. 12). Respondent required its employees to manually carry all of this ice up the 15-foot ladder (R. 56, 57).

Sometimes two men were assigned to this task. They could then alternate in climbing to the top of the cars and

thereby reduce the amount of energy required in doing this job (R. 24, 42).

Petitioner testified that this work was the most strenuous work he had ever performed and that it required more exertion than pitching hay, digging a trench or hauling cement in a wheelbarrow (R. 13). Other witnesses testified that carrying ice up a ladder 28 to 30 times would be hard and difficult work and would be "pretty rough" (R. 43, 44, 45, 47). One witness testified that he would be physically unable to ice three diners (R. 44). Witnesses agreed that this work was extremely tiring (R. 43, 45, 47).

On August 11, 1949, petitioner immediately after lunch was instructed to ice three diners (R. 15). He was to accomplish this job alone. He started at approximately 12:00 noon (R. 15). He followed the usual practice in performing this task by climbing up this 15-foot ladder with a 100-pound cake of ice on his back, heaving the ice from his shoulder to the car, cutting each piece into smaller pieces and filling the holes at the top of the diner (R. 16, 17). He completed the icing of the first two diners between 1:00 and 1:30 P.M. (R. 16). At that time he felt considerably fatigued from doing an extraordinary job he was not used to doing (R. 16).

He rested for approximately a half hour while talking to a friend and then proceeded to ice the third diner (R. 16, 17, 41). He noticed on the last trip up the ladder that he was quite winded and a pain hit him through the chest (R. 17). He threw the ice from his shoulder and leaned over the car for several seconds and then finished the job (R. 17). He became dizzy, walked across the platform and lay down across a baggage wagon (R. 17). He was able to get home in his automobile (R. 18). His condition became progressively worse and finally on the evening of the next day he

was taken to the hospital (R. 19). The doctors concluded that he was suffering from heart failure (R. 26, 52).

Petitioner estimated that he had climbed the ladder with 100-pound cakes of ice a total of between 26 and 30 times (R. 23). He had thus been required to carry approximately 1½ tons of ice to the tops of these diners during the performance of this work (R. 23).

Petitioner introduced substantial and uncontradicted evidence that there were a number of practical lifting mechanisms which could be used in icing diners obviating the necessity of abnormal and unusual physical exertion.

Just a few tracks away cars were iced by the use of a truck and platform hoist (R. 39, 57). Ice was placed on this platform and then raised to the top of the cars where it could be slid over and into the cars (R. 39, 57). Express cars from passenger trains were iced on these tracks and in this manner (R. 39). Testimony, without contradiction, established that it would be simple and practical to switch the diners onto the same tracks and ice them without manual lifting of any ice (R. 39).

Prior to the use of this truck an escalator or conveyor belt had been used to lift the ice to the top of cars and this equipment would be practical for use in icing diners (R. 40, 57).

Testimony was introduced that there was a tractor with a lifting mechanism which would also be practical for use in icing diners (R. 14, 46).

Testimony of respondent's General Car Foreman Adams admitted that the truck and hoist and conveyor belt could be used in icing diners (R. 57).

A heart specialist examined petitioner eight days after the onset of his heart failure (R. 25). He opined that petitioner had a rheumatic heart (R. 26), that 50% of the

adults having a rheumatic heart are not aware of the condition and that many of them go through life without suffering a heart failure (R. 27, 28). Those who suffer such failure do so as a result of an unusual stress or exertion (R. 28). This specialist was of the opinion that petitioner's heart failure was precipitated by "unusual and severe exertion" caused by icing diners in the method specified (R. 30, 32). He further testified that, in his experience, a heart failure in such case was not from gradual development but from "some sudden unusual thing" (R. 36). The doctor concluded that petitioner's work capacity and exercise tolerance had been permanently impaired as a result of his injury (R. 31).

Petitioner finally returned to work but after three months he was discharged because of his heart condition (R. 20).

Specifications of Error

1. The Utah Supreme Court committeed prejudicial and reversible error in denying to petitioner a jury trial by setting aside a jury verdict for petitioner and directing that judgment be entered for respondent.

2. The Utah Supreme Court committed prejudicial and reversible error in holding that there was no evidentiary basis to support a jury finding of negligence by respondent in failing to furnish sufficient equipment to perform the job of icing diners.

3. The evidence presents an evidentiary basis to support a finding of causal relation between respondent's negligence and petitioner's injury.

ARGUMENT

Point I

The Utah Supreme Court committed prejudicial and reversible error in denying to petitioner a jury trial by setting aside a jury verdict for petitioner and directing that judgment be entered for respondent.

The Utah Supreme Court took it upon itself to determine that there was no evidence of negligence. To do so, it was necessary for it to set aside the verdict and finding to the contrary rendered by the tribunal chosen by Congress to decide such issues of fact. As appears herein, the evidence was such that reasonable minds could differ on the existence of negligence thereby placing this case within the principle of the many cases decided by this Court in the last decade assuring to these injured workmen trial by jury.

We will quote from two of these cases to again bring before the Court the fundamental rules violated by the Utah court and which apply in this case.

In *Bailey* v. *Central Vermont Ry. Co.*, 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, this Court stated:

> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' *Jacob* v. *New York City*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward

it may be, it is the system which Congress has provided. *To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.*"

* * * * * * *

"* * * all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue, * * * as well as issues involving controverted evidence. * * * To withdraw such a question from the jury is to usurp its functions."

In *Lavendar* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, this Court set forth the general rule for determination of whether a case presents a jury question. It stated:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Many other cases give meaning to these principles and are cited in the Petition which this Brief supports.

We submit that these fundamental principles were not given effect and the Utah Court but usurped the functions of the jury.

Point II

The Utah Supreme Court committed prejudicial and reversible error in holding that there was no evidentiary basis to support a jury finding of negligence by respondent in failing to furnish sufficient equipment to perform the job of icing diners.

The Utah Supreme Court held that without the rheumatic heart, injury would not have resulted, and because respondent did not know of this condition, injury to him could not be reasonably foreseen and hence there is no liability. The court directed its entire attention to petitioner's condition and not to respondent's duty and breach thereof. Under the evidence, without the severe exertion, the injury would not have resulted.

The court held as matter of law there was insufficient evidence to support a finding of negligence and necessarily that no reasonable mind could find its existence, although eight jurors found that respondent had failed to exercise reasonable care in furnishing to petitioner sufficient equipment with which to perform the tasks of his employment and a trial judge held that an evidentiary basis existed to support such finding.

Reasonable forseeability of harm to someone must be present to establish negligence. Injuries because of overexertion can as well be foreseen as other types of injuries. A reading of the cases discloses that overexertion has resulted in such injuries as hernias, ruptured intervertebral discs, coronary occlusions, spondylolisthesis, ruptured blood

vessels, etc., and these are usually cases where the weakness was not discoverable.

Substantial evidence was introduced to show that the task of icing diners required extreme and unusual exertion and one witness testified that it would have been beyond his physical capacity to complete the icing of three diners such as was done by petitioner.

A concept of negligence which requires the foreseeability of the exact injury to a particular person has not been adopted by any court under the Federal Employers' Liability Act until the Utah Supreme Court decided this case.

Another and safer method of accomplishing this task was readily available to respondent and in fact was used in respondent's yard. It could have supplied its employees with equipment which would have hoisted the ice to the top of the diners, thereby eliminating the necessity of severe exertion on the part of its employees and eliminating the chance of injury from overexertion. It is petitioner's contention that the failure to furnish such hoisting equipment presented a jury question of failure to exercise reasonable care.

The Federal Employers' Liability Act expressly imposes a duty on carriers to furnish sufficient equipment. It provides (45 U.S.C.A., Section 51):

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part * * * by reason of any defect or insufficiency, due to its negligence, in its * * * appliances * * * or other equipment."

Where further precautions for the safety of employees can be taken by an employer and are not, then there exists

an evidentiary basis for a finding that negligence exists. That is the holding in *Boston & M.R.R.* v. *Meech,* 156 F. 2d 109, (cert. den. 329 U. S. 763, 67 S. Ct. 124, 91 L. Ed. 658). It related to safe place to work, but the same reasoning is applicable. There petitioner's decedent was removing small tools, lanterns, etc., from engines. He worked on a "wash stand" which consisted of platforms on both sides of the track which were six inches above ground level. A locomotive was driven between the platforms and hit and killed decedent. The court pointed out that the engine could have been driven more carefully by having another employee keep a watchout from the fireman's side or from some other place on the engine. Also lines could have been drawn on the platform to show the extent of the overhang of the engine or the platform could have been moved back from the tracks. The court concluded that since these other things could have been done and were not, an evidentiary basis for finding negligence existed. The court said at page 111:

> "From the foregoing, it is clear that although some precautions were taken for the decedent's safety, further precautions were possible, and from this it follows, as we read the decisions cited above, that there was an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence that our 'function is exhausted'."

In *Boston & M.R.R.* v. *Kyle,* 156 F. 2d 112, a machinist was injured when a heavy part of an engine which he and another were repairing fell and struck him on the knee. They were working under the instruction of their foreman. They were performing the job in the usual and customary way but there was another way which was safer. If this latter method were employed, no injury would have occurred. It was held that defendant's negligence was a jury question.

See also *Williams* v. *Atlantic Coast Line R. Co.*, 190 F. 2d 744, where it was held open to a jury to find a duty to furnish suitable equipment.

Under the authority of these cases a jury question was presented in the case at bar. Another method, by use of sufficient and adequate equipment, was available which would have eliminated overexertion and the injury to petitioner's heart.

A Federal Employers' Liability Act case closely analogous to the case at bar is that of *Stewart* v. *Baltimore & O. R. Co.*, 137 F. 2d 527 (2 C.C.A.). There a hostler's helper wrenched his side in trying to throw a switch. Another employee by use of a bar threw the switch. It appeared that this switch was "brand new" and hard to throw. That night plaintiff suffered severe pain in his chest and died 24 days later of a coronary thrombosis. A doctor testified this was caused by the exertion of throwing the switch. The trial court directed judgment dismissing the action and the Appellate Court reversed on the grounds there was enough evidence to require submission to the jury. The court stated at page 528:

> "• • • In our opinion it was for the jury to say whether operation of the switch in question was so likely to result in injury from over-exertion that a prudent employer would not have supplied it to his workmen, but would rather have furnished a more easily turned appliance. There have been many decisions which have held that it is negligent to require a workman to move articles that are too heavy for him to lift without help".

The court recognized the rule for which we contend (page 529):

> "Doubtless an employee cannot recover damages for every harm he may suffer through failure of his em-

ployer to provide him with the best sort of appliance unless the situation is such that the chance of injury can be reasonably foreseen. But where, as here, the likelihood of injury from the operation of a switch that was hard to turn cannot be said to have been beyond a reasonable apprehension the question of whether the employer maintained a proper standard of care was for the jury. *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. —. Over-exertion resulting in serious casualties is something which can as well be foreseen as many other occurrences and is something which an employer may be thought bound to take all reasonable steps to prevent."

Here we submit that respondent was under a duty to take steps to prevent overexertion casualties in a case where safer equipment was readily available. As the court points out, injuries from overexertion can be foreseen and here respondent took no steps to prevent such injury. The jury should hence decide the existence or nonexistence of negligence.

This case conclusively answers respondent's argument that smaller pieces of ice could have been handled over a longer period of time. Petitioner was performing his duty in the usual way. Decedent in the *Stewart* case need not have exerted himself as he did, but he did so to accomplish his work.

It is not our contention that a carrier's duty is to furnish the safest and best equipment but it is our contention that when safer and better equipment than that supplied is readily available and is not supplied, then a jury question arises whether reasonable care has been exercised where injury has resulted from extreme and unusual exertion caused by the use of inferior equipment.

The Utah court incorrectly restricted foreseeability to exact injury and exact person. Because respondent did not

know of the rheumatic heart of petitioner it could not foresee heart failure to petitioner. But it is charged with knowledge of the extreme and severe exertion of icing diners manually and should know that such could well cause injury to some of the workers, whether hernia, coronary occlusion, or heart failure is immaterial.

We submit that the Utah court was in error in holding that an employer could not reasonably foresee that some employees of a class would have a physical weakness. But that is not the question. The *Stewart* case, *supra,* states and correctly answers the problem here—foreseeability of some injury from overexertion.

Virginian Ry. Co. v. *Staton,* 84 F. 2d 133, exemplifies the rule that foreseeability is not limited to exact person or exact injury. The court there stated at page 135:

> "• • • The particular accident which happened in this case was doubtless unusual; but liability is not dependent upon a prevision of the precise event. It is sufficient if some injury may be reasonably expected, unless precaution is taken. *Texas & P. Ry. Co.* v. *Carlin* (C.C.A.), 111 F. 777, 60 L.R.A. 462, affirmed 189 U.S. 354, 23 S. Ct. 585, 47 L. Ed. 849; *Johnson* v. *Kosmos Portland Cement Co.* (C.C.A.), 64 F. 2d 193; *Memphis Consol. Gas & Electric Co.* v. *Creighton* (C.C.A.), 183 F. 552; Restatement of the Law of Torts, Sec. 435."

While there is no case by this Court precisely in point on the facts, the case of *Blair* v. *Baltimore & O. R. Co.,* 323 U.S. 600, 65 S. Ct. 545, 89 L. Ed. 490, closely approaches the problem here. There a "nose truck" commonly used for freight and luggage was the best equipment available for accomplishing the task of moving a 1,000 pound, 30 foot steel tube. This Court held that the suitability of such truck for such purpose, along with surrounding circumstances, could be considered by the jury in determining whether the

employer complied with its duties in a reasonably careful manner and held a jury question was presented.

To permit the Utah opinion to stand will eliminate recovery for straining injuries where the carrier requires unnecessary exertion. Ordinarily such injuries do not occur in the absence of some unknown physical weakness.

We submit that under the foregoing authorities an evidentiary basis for negligence of respondent existed for the finding of the jury that respondent was negligent and that reversible error was committed in denying to petitioner a jury trial on this subject.

Point III

The evidence presents an evidentiary basis to support a finding of causal relation between respondent's negligence and petitioner's injury.

The Utah court did not reach the point of deciding whether the negligence of respondent was a cause in whole or in part of petitioner's injuries. This being an element of petitioner's right to recover, we deem it necessary to briefly point out wherein the testimony makes a jury question on this subject.

Dr. J. G. Olson specifically testified that the unusual and severe exertion entailed in icing diners as petitioner did on August 11, 1949, was the precipitating cause of the heart failure and consequent permanent injury (R. 31, 32).

Under this evidence it is unescapable that the exertion was required by insufficient equipment and this in turn caused the injury. In other words, but for the negligence of the respondent, the petitioner would not have been injured.

This is the rule of causation employed by this Court in

Tennant v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, wherein the Court stated (321 U. S. 34):

> "• • • The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable 'for • • • death resulting in whole or in part from the negligence of any of the • • • employees'."

That the injury would not have occurred except for the rheumatic heart does not eliminate the fact that neither would the injury have occurred except for the unusual and severe exertion required of petitioner in icing diners with the insufficient and inadequate equipment supplied.

We also respectfully submit that this case affords an opportunity to establish a rule of causation under the Federal Employers' Liability Act. We do not believe this Court has expressly directed its attention to the problem of laying down a rule of causation to be applied under the Federal Employers' Liability Act, thereby giving effect to the intention of Congress. It is to be noted that Congress does not use in that Act the word "proximate" but does use the broadening words "in whole or in part," thereby recognizing multiplicity of causes.

This Court has not given consistent concepts of this important element of a cause of action under the Act. Apparently in *Brady* v. *Southern R. Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239, causal relation requires foreseeability. In *Tennant* v. *Peoria & Pekin Union R. Co., supra,* the "but for" rule was applied. In *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 203, the court, in describing this concept, used the words "contributory proximate cause" and "contributes in part."

We believe Congress by its language here meant to elim-

inate from Federal Employers' Liability Act cases those old, confusing, common-law restrictions on causation expressed by such words as "proximate," "efficient," "direct." All that should be required is cause in fact without restrictive qualification or limitation. Interpretation of this important phase of the Federal Employers' Liability Act in accordance with interpretation of other parts of the Act will result in establishing such a concept of causal relation. See, for example, *Urie* v. *Thompson,* 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, wherein this Court refused to add any words of qualification upon "injury" as contemplated by the Act. See the authoritative articles by Jeremiah Smith on Legal Cause in Actions of Tort found in 25 Harvard Law Review 103, 223, 303.

We respectfully submit that there is substantial evidence to support a finding that the respondent's negligence caused in whole or in part petitioner's injuries.

Conclusion

The questions presented by this Petition for a Writ of Certiorari raise problems of great importance to employees coming within the protection of the Federal Employers' Liability Act. Employers under that Act should certainly be required to exercise reasonable care to furnish sufficient equipment where it is readily available in order to eliminate injuries caused by extreme and unusual exertion from the use of insufficient equipment. Juries should be permitted to determine, under all the circumstances of such a case, whether that duty has been fulfilled where injuries result from such causes.

We respectfully submit that this Court should grant this Petition and announce definite rules on the questions here presented. We believe that the importance of the problems and the seriousness of the error committed by the Utah

Supreme Court in setting aside a jury verdict justifies petitioner in requesting and this Court in issuing a Writ of Certiorari.

Respectfully submitted,

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(4478)

INDEX

Page

SUBJECT INDEX

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI 1

STATEMENT OF THE CASE 1

ARGUMENT 7

POINT I. THERE WAS NO EVIDENTIARY BASIS IN THIS CASE FOR A FINDING BY A JURY THAT RESPONDENT WAS NEGLIGENT 7

POINT II. THE REMAINING REASONS ADVANCED BY PETITIONER FOR THE GRANTING OF A WRIT OF CERTIORARI ARE INADEQUATE 17

CONCLUSION 21

TABLE OF CASES CITED

Atlantic Coast Line R. Co. v. Craven, 185 F. 2d 176 .. 15

Atlantic Coast Line R. Co. v. Dixon, 189 F. 2d 525, (Cert. denied, 342 U. S. 830) 9, 15

Bailey v. Central Vermont Ry., Inc., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 ..... 9, 18

Bowing v. Delaware Rayon Co., (Del.) 192 A. 598 13

Butz v. Union Pac. R. Co., 233 P. 2d 332 (Petition for Rehearing denied 238 P. 2d 1128) 19

Eckenrode v. Pennsylvania R. Co., 335 U. S. 329, 69 S. Ct. 91, 93 L. Ed. 41 ..... 18, 19

Great Altantic & Pacific Tea Co. v. Evans, (Texas) 175 S. W. 2d 249 13

Hunt v. New York Central Railroad Co., (N. Y.) 103 N. Y. S. 2d 355 13

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 18

Page

Louisville & N. R. Co. v. Willhite, 187 S. W. 2d 1010 12

Moore, Adm. v. Chesapeake & Ohio R. Co., 340 U. S. 573, 71 S. Ct. 428, 95 L. Ed. 547 ..... 18, 19

Owen v. Rochester-Penfield Bus Co., Inc., 103 N. Y. S. 2d 137 ..... 11, 12, 17

Palsgraf v. Long Island Ry. Co., 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253 ..... 10, 11, 16

Raymond v. Union Pac. R. Co., 113 Utah 26, 191 P. 2d 137 19

Southern Railway Co. v. Bell, Sheriff, 114 F. 2d 341 12

Sowers v. Virginian Ry. Co., (W. Va.) 133 S. E. 325 13

Stewart v. Baltimore & Ohio R. Co., 137 F. 2d 527 16

Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 9

Warden-Pullen Coal Co. v. Wallace, (Okla.), 56 P. 2d 803 13

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 ..... 19, 20

STATUTES AND RULES CITED

Federal Employers' Liability Act, 45 U. S. C. A. 51, et seq. 9

Rules of the Supreme Court of the United States, Section 5 of Rule 38 20

TEXTS CITED

175 A. L. R. 982 15

Corpus Juris Secundum, Vol. 65, p. 401 13

Treatise on the Law of Torts, Harper, Sec. 145, p. 314 ..... 13, 14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 396

HARRY KIRK CREAMER,

Petitioner,

vs.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY, a Corporation,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent respectfully submits that petitioner's statement of the case pointedly ignores and disregards certain decisive evidence received at the trial; and delicately camouflages an equal important failure of proof on facts vital to petitioner's right to recover. As a result, the fundamental basis for the decision of the Utah Supreme Court is obscured. To defend the reasons for that decision and to dispel, preliminarily, any distorted impression of the case created by petitioner's statement, it is necessary that we here outline the evidence more fully.

Harry Kirk Creamer, plaintiff in the Utah courts and petitioner in this Court, was employed as a coach cleaner by the respondent, The Ogden Union Railway and Depot Company, on August 21, 1946 (R. 9). At and prior to the time of his employment he was afflicted with a rheumatic heart condition caused by a childhood disease (R. 34, 52, 58). This heart condition was unknown to Creamer and to the respondent until after the events which gave rise to this lawsuit in August, 1949, despite the fact that the petitioner had been examined by a competent physician at the time of his employment (R. 21, 76; Ex. 4). Creamer had performed manual work for his livelihood during most of his adult life (R. 9); and had been active in hunting, fishing, and other forms of athletic recreation (R. 21). During the three years after his employment by respondent, and until the day of the events from which this suit arose, Creamer had performed without difficulty all of the various duties required of a coach cleaner, including the duty of icing diners in the yards at Ogden (R. 21, 22). On August 11, 1949, approximately three years after his original employment by respondent, petitioner was 36 years of age, was 6'1" tall, and weighed approximately 215 pounds (R. 20, 21). He could not remember any illness which he had suffered for twenty years prior to that date (R. 21). His appearance was normal in all respects (R. 54, 56). It seems fair to say that to all outward appearances petitioner was a big, strong, well-built man in the prime of his life. As he testified himself, "It was not much of a job for me to lift a 100-pound piece of ice and put it on my shoulder" (R. 17, 18).

At approximately 11:30 a.m., on said date, petitioner was assigned by his foreman to ice three yard dining cars (R. 23). This work required that he fill the bunkers on top of the diners with small chunks of ice. Alongside the various tracks where these three diners had been placed, other employees had spotted small hand trucks loaded with large cakes of ice weighing approximately 300 pounds each (R. 12, 16; Ex. 2). It was petitioner's job to cut these large cakes of ice into smaller pieces and then to carry the smaller pieces on his shoulder up a ladder to the tops of the respective diners. With an ice pick, he would there chip the smaller pieces into chunks

about the size of a man's fist. These chunks were then used to fill the bunkers (R. 16).

Creamer knew that the instructions issued by his supervisors directed that each man assigned to this type of work was to choose for himself the size of the piece of ice which he carried to the top of a diner (R. 13, 22). Petitioner knew that the instructions further provided that no employee was to attempt to carry a larger piece of ice up the ladder than the man himself felt that he was able to handle (R. 13, 22). Creamer completed the job to which he had been assigned and in so doing made a total of between 26 and 30 trips up a ladder approximately 14 or 15 feet high, voluntarily choosing to carry chunks of ice weighing approximately 100 pounds on each of said trips (R. 12, 23). In addition to this work of carrying ice up the ladder, he also chipped the 100-pound pieces of ice into small chunks and filled the bunkers at the top of the diners with these chunks.

There were actually 3½ hours remaining on Creamer's shift on duty when this work was commenced (R. 23). Petitioner admitted that this time was fully adequate for completion of the job without haste (R. 23). He realized that if he finished the task before 3:00 p.m., when his shift ended, he would be permited to quit work and spend the remaining time cleaning himself up and preparing to go home. He also knew that he would be paid his wages until 3:00 p.m., no matter when he finished the job (R. 23). Creamer testified that at approximately 1:30 p.m., he rested for a period of about one-half hour, while smoking and talking with a friend, who was a fellow employee off duty (R. 16). This is corroborated by petitioner's witness, Louis D. Waymen (R. 41). The evidence discloses that Creamer finished the whole job sometime between 2:00 p.m. and 2:30 p.m., when there was a minimum of one-half hour, and perhaps a full hour, remaining on his work shift (R. 23). It is therefore conclusively established by the evidence that Creamer was permitted to and did set his own pace in performing the task. The technique employed in icing diners actually compelled petitioner to interspace the climbing of the ladder with substantial intervals of less arduous labor. Creamer testified

that he carried three or four 100-pound pieces of ice to the top of a diner and then chipped those pieces into chunks which he placed in the bunkers. This process was then repeated until the three diners were iced (R. 16). The periods of time spent in relatively light exertion chipping the ice necessarily interrupted the heavier work of climbing the ladder. Accordingly, the evidence does not support the view that petitioner was required to make 26 to 30 consecutive trips up the ladder without pause or respite.

At the end of this shift, and during the course of the ensuing night and day, petitioner suffered a partial failure of his heart (R. 18). The medical testimony in this case establishes beyond dispute that the basic nature of Creamer's illness was a rheumatic heart condition caused by disease which petitioner had incurred prior to this employment by respondent and for which respondent was in no way responsible (R. 27, 28, 34, 35, 52, 58). This disease had caused inflammation of the lining and muscles of his heart and had resulted in a permanent scarring of the valves of the heart. This scar tissue in a rheumatic heart is often a subtle defect, revealing no symptoms whatever (R. 27, 28). Such a hidden condition does not always make itself manifest during the life of the affected individual, but usually does, sooner or later. The years between the ages of 35 and 45 are typically the period when such a condition results in a failure of the heart (R. 28). Usually, the failure of the heart, as distinguished from the pre-existing reheumatic heart condition, is precipitated by some sort of exertion, which the doctors described as unusual and severe. But the words, "unusual and severe exertion," as used by these medical witnesses refer to a type of exertion which they considered as unusual and severe for a person with a damaged heart (R. 37, 59, 60). These doctors agreed that the work which petitioner did on August 11, 1949, had further impaired his already weakened heart. The doctors, however, did not testify and did not even suggest that the exertion which Creamer engaged in on August 11th was either unusual, severe, or injurious to a man of Creamer's physique with a normal heart. The testimony of petitioner's own doctor was that any type of relatively strenuous effort

may precipitate the failure of a rheumatic heart such as Creamer was suffering from, whereas the heart of a normal person will not be damaged or adversely affected by the same activity (R. 37, 38). In substance, the doctors who examined Creamer were in agreement that the work performed by Creamer on August 11, 1949, had caused a failure of petitioner's heart and a permanent diminution of his working capacity; but that this had happened solely because his heart was in a weakened condition when he commenced the work.

That the actual work performed by the petitioner on the day of the so-called accident was neither dangerous nor harmful to a person in normal health is established by the following unchallenged testimony of Dr. Don D. Olsen, one of the specialists who treated petitioner.

> "I am quite familiar with the work in icing diners in the yards of the defendant company. I understand they carry ice up and put it in the cars and that they climb ladders with a cake of ice weighing 100 pounds.
>
> "Q. Doctor, assuming a normal person, with no heart disease, and who is otherwise in good health, assume he is called upon to work during the course of approximately three hours to carry chunks of ice of one hundred pounds up a ladder of about fourteen feet high, I think the testimony is, and upon the top to break into smaller pieces and put down in the holes there in top of the diners. Assume the man who does that, he is about thirty-five or thirty-six years of age. He is in the neighborhood of 6'1" tall and he weighs approximately 215 pounds, I think the testimony is, and normally muscular; would that kind of exercise damage or in any way injure the heart of such a person?
>
> "A. I wouldn't think so.
>
> "Q. Is that overexertion for the heart of a normal individual?
>
> "A. No" (R. 59).

* * * * *

On cross-examination by petitioner's counsel this witness stated:

> "Q. In connection with the job of icing a car, do you have in mind an individual climbing up a ladder about 15' and carrying about three thousand pounds of ice up to the top of the car, would you state there would be no overexertion?
>
> "A. It wouldn't be overexertion for a normal healthy man, as he asked me. I didn't say anything about Harry" (R. 60).

Several lay witnesses for the petitioner testified that the process of icing diners was strenuous and tiring work, making some demands upon the stamina of employees who performed the task. Significantly, not one of these witnesses stated that he had himself suffered any ill effects from performing work such as Creamer had done on August 11, 1949. Other witnesses testified that there are mechanical devices which are capable of lifting ice to the top of a diner. Since respondent admitted at the trial, and now concedes, that such machinery exists, there is little point in detailing the testimony in this regard. Respondent likewise concedes, as is shown by the evidence, that the task of icing diners is hard work. In this connection, however, the record further discloses that this manual method of icing diners has been used for years; that more than 100 different individuals have performed such work during the six years prior to August 11, 1949 (R. 55, 56); that such work is still being so performed (R. 47); and that women had done this work during the war years, although they had not been permitted to choose for themselves the size of the piece of ice which they were to carry to the top of a diner. Instead, they had been required to carry a piece of ice weighing no more than 30 pounds because the foreman understood that state law so required (R. 56).

The only medical testimony concerning the effect which work of this type as performed by Creamer would have on a man with a normal heart is found in the testimony of Dr. Don

D. Olsen, hereinabove set forth. A significant fact, glossed over by petitioner, is that the record in this case is entirely devoid of any evidence from any source that the respondent required of petitioner, or of any other workman, the exercise of that degree of effort which was dangerous to the health of such individual, if the workman was in a normal condition of health. The record is likewise entirely devoid of any evidence that the respondent ever assigned to this type of work any employee known, or even suspected, to be in other than a normal condition of health.

ARGUMENT

POINT I.

THERE WAS NO EVIDENTIARY BASIS IN THIS CASE FOR A FINDING BY A JURY THAT RESPONDENT WAS NEGLIGENT.

A. *The negligence which petitioner charged against the respondent:*

By his complaint petitioner alleged, in substance, that respondent was guilty of the following acts of negligence:

(1) Negligence in requiring the petitioner to pull heavily loaded ice wagons manually to and from various positions along the platforms in the Ogden Yard without mechanical assistance;

(2) Negligence in requiring the petitioner to carry 100-pound cakes of ice on his shoulder up a ladder to the tops of diners, subjecting the petitioner to unusual hazards and dangers of overexertion and overwork;

(3) Negligence in failing and neglecting to furnish the petitioner with a tractor or other mechanical device with which to pull ice wagons along the platforms above referred to;

(4) Negligence in failing to furnish the petitioner with a mobile elevator to lift the ice blocks to the tops of the diners;

(5) Negligence in failing to furnish the petitioner with a conveyor belt to lift said ice blocks to the tops of diners (R. 2, 3).

Stripped of ornamentation and duplication, petitioner's complaint charged the respondent with negligence in requiring the petitioner to overexert himself in two different ways when machinery could have performed the task. The first alleged overexertion was the manual handling of wagons loaded with ice along the platform, and the second was the carrying of ice manually to the tops of diners. Petitioner's whole contention is that the respondent was guilty of negligence in requiring the petitioner to perform these two tasks manually, rather than with the aid of machinery.

B. *The facts as to these charges of negligence:*

Perhaps petitioner has abandoned any theory that the respondent was negligent in the respects set forth in items (1) and (3) above. Certainly petitioner has not even mentioned the work done by him in moving ice wagons throughout the whole of his petition for certiorari and his brief in support thereof. Since, however, he had not expressly abandoned these charges of negligence made in his complaint, it is necessary that we deal with them here.

We respectfully submit that the evidence concerning the work of moving ice wagons along the platform has no significance whatever in determining whether this case presented a jury question. The petitioner did not even suggest that he had overexerted himself in handling ice wagons on the day of the accident. Concerning the task of icing the first two diners on which he worked on August 11, 1949, the only mention which petitioner made of moving ice wagons is to be found at page 16 of the record, where he stated that he moved three or four small wagons partially loaded with two or three cakes of ice about 20 or 30 feet to ice the first diner. In icing the third diner on that date, petitioner testified that he moved another ice wagon approximately 100 yards with the assistance of two other men (R. 17). There is no testimony that this work constituted an undue burden upon the petitioner's heart, nor is there any testimony that this work had any effect in precipitating the failure of petitioner's heart. In the hypothetical question which petitioner's counsel asked of Dr. J. G. Olson concerning the cause of the failure of the

petitioner's heart no mention was made of any work in connection with moving ice wagons. Dr. J. G. Olson attributed the failure of petitioner's heart entirely to its diseased condition and to the effort which Creamer expended in carrying 100-pound pieces of ice up a ladder to the tops of the three diners (R. 29, 30). In the absence of any evidence from the petitioner or from his doctor, or from any other witness that moving the ice wagons required overexertion or resulted in any failure of the petitioner's heart, the only remaining charge of negligence on which the petitioner can possibly rely is the alleged negligence of the respondent in requiring the petitioner to carry pieces of ice to the tops of these diners without machinery to do the work for him. The facts in this regard have been heretofore set forth in detail in this brief.

C. *As a matter of law the evidence was not sufficient to establish that respondent was negligent in assigning petitioner to carry ice up the ladder manually:*

An employer's negligence in a suit under the Federal Employers' Liability Act, 45 U. S. C. A. 51, et seq., is to be determined by the common law principles as established and applied in the federal courts. *Urie* v. *Thompson*, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282. In the federal courts negligence means a failure to use reasonable care commensurate with the danger attending the situation presented. *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444. The standard of conduct imposed upon a defendant under this law is that of a reasonable prudent person. *Atlantic Coast Line R. Co.* v. *Dixon*, 189 F. 2d 525. Certiorari denied 342 U. S. 830.

The record in this case contains no evidence and warrants no inference that the conduct of respondent in assigning petitioner to ice three diners manually was negligent as that term is defined above. To the contrary, the evidence in the case at bar establishes the following facts without dispute:

(1) Petitioner was assigned to a type of work he had performed without difficulty theretofore (R. 21).

(2) Petitioner was directed to choose for himself the size of the pieces of ice he would carry up a ladder according to his own capabilities (R. 22).

(3) Petitioner was permitted to and did set his own rate of speed in performing the work (R. 23).

(4) The duty to which petitioner had been assigned was not hazardous to a person of Creamer's physique in a normal condition of health (R. 59, 60).

(5) The respondent neither knew nor had any reason to suspect that Creamer was afflicted with a diseased heart or with any other physical defect (R. 21, 54, 56, Ex. 4, R. 75-76).

Mr. Justice Cardozo's remarks concerning the nature of negligence in the case of *Palsgraf* v. *Long Island Ry. Co.*, 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253, seem appropriate:

> "* * * the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. * * * The risk reasonably to be perceived defines the duty to be obeyed."

There was no danger which was apparent to the eye of reasonable vigilance in assigning petitioner to ice these three diners in the manner indicated. There was no risk of harm reasonably to be perceived in requiring petitioner so to perform the task. An unknown and unsuspected heart condition actually made the work which Creamer did dangerous to his health. But this was a hidden danger akin to the concealed bomb referred to in the *Palsgraf* case by Mr. Justice Cardozo. Failure to foresee such a hidden danger and to guard against it, is not negligence. To borrow Mr. Justice Cardozo's language from that case:

> "Life will have to be made over, and human nature transformed, before previsions so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform."

Such was the unanimous conclusion of the five Justices of the Utah Supreme Court and they are abundantly supported by authoritative texts and decisions dealing with similar fact situations. A case squarely in point is that of *Owen* v. *Rochester-Penfield Bus Co., Inc.*, 103 N. Y. S. 2d 137. There plaintiff suffered from a chronic valvular heart lesion, with resultant low blood pressure and defective blood circulation. Her feet were frostbitten while traveling on defendant's bus, because the defendant permitted the temperature inside the bus to reach a point which her system was unable to withstand, but which would have done no damage to a normal person. In determining that the plaintiff had not made a case which should be submitted to a jury, although there was some evidence that the bus was equipped with a defective heater, the New York court said:

> "Plaintiff's injuries did not come within the realm of reasonable foreseeability. Defendant was under no legal duty to guard against dangers which could not reasonably be foreseen. Negligence is to be gauged by the ability of one to anticipate danger. The test of actionable negligence is not what could have been done to have prevented a particular accident, but what a reasonably prudent and careful person would have done under the circumstances in the discharge of his duty to the injured party. Failure to guard against a remote possibility of accident, or one which could not, in the exercise of ordinary care, be foreseen, does not constitute negligence. As phrased by Chief Justice Cardozo in *Palsgraf* v. *Long Island R. R. Co.*, 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253: 'The risk reasonably to be perceived defines the duty to be obeyed.' That no injury was sustained by other passengers demonstrates that there was no danger which could reasonably be apprehended. Had defendant been advised of plaintiff's condition it might well have afforded her some form of additional protection. * * * To hold a carrier liable for injuries or illness to all persons, normal and abnormal, especially when the abnormality is not known, would make a

carrier an insurer of the well-being of all passengers. As yet the point has not been reached where such is the law.

* * * * *

"The cases cited by respondent are readily distinguishable. They all deal with foreseeable danger to normal persons and acts which would constitute negligence to normal persons, and stand only for the proposition that a party once guilty of negligence cannot escape additional consequences or damages because of a previously existing condition. Here plaintiff would not have been injured at all but for her previous physical condition."

In the case of *Louisville & N. R. Co.* v. *Willhite*, 187 S. W. 2d 1010, decided by the Court of Appeals of Kentucky in 1945, the identical problem presented in this case was also decided. There the plaintiff had sued to recover for injuries sustained while in the employ of the defendant railroad as a result of alleged negligence in requiring him to lift cross-ties without providing a sufficient and adequate number of fellow workmen. It appeared from the evidence that the plaintiff had an enlargement of the inguinal rings and spermatic cord, which rendered him peculiarly susceptible to a rupture or hernia at any time. This condition was not known to the defendant employer. In lifting ties the plaintiff sustained a hernia. The Kentucky court made the following statement concerning the law applicable to the alleged negligence of the defendant:

> "Appellant was not advised of plaintiff's condition, and had the right to assume (plaintiff) to be in ordinary physical condition. That being true, (defendant) cannot be charged with negligence unless it is shown by the evidence that it failed to provide a sufficient number of workmen to assist a person of ordinary physique to perform in safety the work required."

Many other courts have reached the same result:

Southern Railway Co. v. *Bell, Sheriff*, 114 F. 2d 341;

Great Atlantic & Pacific Tea Co. v. *Evans*, (Texas) 175 S. W. 2d 249;

Sowers v. *Virginian Railway Company*, (W. Va.) 133 S. E. 325;

Hunt v. *New York Central Railroad Co.*, (New York) 103 N. Y. S. 2d 355;

Warden-Pullen Coal Co. v. *Wallace*, (Okla.) 56 P. 2d 803;

Bowing v. *Delaware Rayon Co.*, (Del.) 192 A. 598.

Texts and other legal works attest the propriety of the Utah court's position:

Volume 65 of *Corpus Juris Secundum*, at page 401, contains the following statement:

> "In the absence of anything which should reasonably suggest such a condition, one is not required to anticipate that another may, for some reason, be unable to exercise ordinary care for his own safety, but the duty to exercise special care with respect to a person, who is for any reason unable to take such care of himself as the normal person might, arises only where there is actual or imputed knowledge of the incapacity. Accordingly, negligence cannot be predicated on conduct which would have reached the standard of ordinary care with respect to an ordinary and normal person in the absence of any actual or imputed knowledge of any infirmity or incapacity of the person in question."

Mr. Fowler Vincent Harper in his *Treatise on the Law of Torts* discussed the matter fully in Section 145, at page 314:

> "Since the matter of the plaintiff's incapacity as bearing upon his duty to exercise care for his own safety is closely connected, in the actual cases, with the defendant's duty to use due care, mention should

be made here of the latter problem. As to the repair of premises or conditions of streets, a defendant owes no greater duty toward persons possessed of physical infirmities than toward others. But if the plaintiff's infirmity or affliction is known to the defendant, the standard of the reasonable man will require him to adjust his affirmative conduct with reference to such person's infirmities, and he may be guilty of negligence for actions which the ordinary prudent person would avoid with respect to them. The known incapacity of the plaintiff becomes one of the 'facts and circumstances of the case,' and the extent of the defendant's duty must be measured accordingly. The degree of care required is the same—the care of the ordinary reasonable man under the same or similar circumstances. But this degree of care obviously requires different conduct toward children, the sick, lame, blind, insane or intoxicated, when such incapacity is known, from that required toward adult persons of sound limb, faculty and mind. 'A sick or aged person, a delicate woman, a lame man, or a child is entitled to more attention * * * from a railroad company than one in good health and under no disability. They are entitled to more time in which to get on or off the cars; they are entitled to more consideration when crossing a street, to the end that the cars shall not run over them.' The point was further brought out in a Texas case in which a landlord, with knowledge of the plaintiff's pregnancy, entered the leased premises and in the presence of the plaintiff made an assault upon some negroes which so frightened her that a miscarriage resulted. The defendant was held responsible. Since the defendant knew of the plaintiff's disability, he should have foreseen some such harm, and he is therefore negligent. Since the risk of the particular harm was one of the very factors which made his conduct negligent, there is, of course, no difficulty with the problem of legal causation. *If the plaintiff's incapacity or disability was unknown to the*

defendant, the reasonableness of the latter's conduct must be determined without reference thereto."

In a rather complete annotation entitled "Liability of Employer for Injury to Employee due to his Physical Unfitness for the Work to which he was Assigned," *175 A. L. R. 982*, the annotator summarizes the law as follows, at page 985:

> "An employer is liable to an employee for injuries received in the course of employment, in the absence of statute declaring otherwise, only upon the ground of negligence on the employer's part. The employer is not an insurer of the safety of his employees, unless made so by statute, and is not liable for consequences of the dangers of the employment; in order to charge him with liability for injury to an employee due to the employee's physical unfitness for the work to which he was assigned it is necessary to show negligence on the employer's part in assigning the employee to the work in question or in requiring him to continue at work for which he was not specifically fitted; *this means that in any event the employer must know or be charged with knowledge of the employee's unfitness."*

Petitioner suggests that respondent was negligent because there was another method available for performing the work in question, that is, use of machinery. But this is not the test of negligence. Proof that there are two methods of accomplishing the same task is no evidence that either method is negligent. That one method may be quicker, easier or less strenuous than the second neither proves nor tends to establish that the second method exposed someone to an unreasonable risk of harm and is therefore negligent. Under the Federal Employers' Liability Act, the common-law rule of ordinary prudence maintains and a railroad is not necessarily required to employ the latest or even the safest devices. *Atlantic Coast Line R. Co.* v. *Craven*, 185 F. 2d 176; *Atlantic Coast Line R. Co.* v. *Dixon*, supra. The question in this case is not whether there existed another method of doing the work which Creamer did. The question is whether or not the method

designated for Creamer's use deviated from the standard of reasonable conduct. For the reasons hereinabove set forth we respectfully submit that it did not.

Petitioner argues that the respondent should have foreseen injury to some one of its coach cleaners who might be assigned to ice diners manually, and consequently, that respondent was guilty of negligence as to this petitioner. We concede that the respondent owes to each and every one of its employees the duty of exercising reasonable care under all the circumstances; but Creamer cannot rely on negligence to someone else as the basis of recovery by him. See *Palsgraf* v. *Long Island Railroad Co.*, supra. In the absence of any knowledge of petitioner's impaired health or any circumstances from which it may be inferred that respondent should have known of this condition, there was no reason for the respondent to perceive danger in assigning this man to the task to be undertaken. If it could be said that the respondent would have been negligent had it assigned a weak or aged person, or an individual known to be otherwise physically handicapped, to Creamer's task, this cannot aid the petitioner who possessed no such known infirmities. What the petitioner was required to show in order to recover was a wrong to himself, not a wrong to someone else. This he failed to do. That he also failed to show respondent ever assigned any employee with a known or suspected infirmity to a task too arduous but emphasizes the futility of petitioner's argument.

In support of his contention that a jury question was presented on the issue of respondent's negligence petitioner has cited five decisions from various Circuit Courts of Appeal and one decision of this Court on which he relies. It is respectfully suggested that these cases were decided on facts dissimilar to the facts of the case at bar. In none of these cases did any situation exist where the sole danger of injury arose from a concealed physical weakness. Without attempting to discuss each of these cases separately, respondent can best point out the distinction between those cases and the case at bar by referring particularly to the facts of one of them, *Stewart* v. *Baltimore & Ohio R. Co.*, 137 F. 2d 527. In that case the plaintiff's intestate died from a coronary throm-

bosis which resulted from straining himself while attempting to throw a defective switch in the defendant railroad company's yards. The switch in question could not be thrown without danger by persons in normal health. The evidence showed that it was necessary to use an iron bar about two feet long as a pry in order to throw the switch. There was no evidence in that case that the defendant had ever tested the switch after it was installed or had ever done anything to prevent it being operated by an employee without undue exertion. The likelihood of injury to some employee in normal health who undertook the operation of such a switch was apparent. Accordingly, the case was for the jury. The legal difference between the effect of such facts and the facts in the case at bar is well explained in the last quoted paragraph of the opinion in *Owen* v. *Rochester-Penfield Bus Co., Inc.*, supra.

We therefore respectfully submit that the Utah Supreme Court did not err in its conclusion that there was no evidentiary basis for a finding of negligence on the part of the respondent. No other conclusion was possible. A standard of reasonable care which forbids an employer to assign an apparently healthy young man to a few hours of honest toil is repugnant to the daily practices of the society in which we live.

POINT II.

THE REMAINING REASONS ADVANCED BY PETITIONER FOR THE GRANTING OF A WRIT OF CERTIORARI ARE INADEQUATE.

Petitioner has suggested two additional reasons for the granting of a writ of certiorari in this case. As we read his petition and brief, these two reasons are substantially as follows: (1) Petitioner contends that this Court should intervene to protect the important principle of the right to trial by jury in suits under the Federal Employers' Liability Act; and (2) petitioner contends that this Court should seize upon this case as an opportunity to discuss the law of causation under said act.

Close scrutiny discloses that neither of these reasons affords an adequate basis for the granting of certiorari in this

case. We respectfully submit that the first of such reasons is inadequate because the *principle* of the right to trial by jury is not here threatened. The Supreme Court of Utah did not disagree with or ignore any principles laid down by this Court protecting the function of the jury in suits brought under said act. *Principles* governing the respective functions of courts and juries in suits under the Federal Employers' Liability Act were not in dispute between the parties before the Utah court and are not in doubt now. This court has settled those principles beyond any possible misunderstanding:

> If there was an evidentiary basis for a verdict in favor of petitioner in the case at bar, then the Supreme Court of Utah had no right to enter judgment for the respondent. *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. On the other hand, if there was no evidentiary basis for a verdict in favor of petitioner in the case at bar, then the Supreme Court of Utah was required to enter judgment for respondent. *Moore, Adm.* v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573, 71 S. Ct. 428, 95 L. Ed. 547; *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329, 69 S. Ct. 91, 93 L. Ed. 41.

Creamer's petition and brief to the contrary notwithstanding, the opinion of the Utah court indicates that it did not disregard or evidence hostility to the first of these principles. Instead, after reviewing all the evidence in the case, the Utah Supreme Court concluded that there was no evidentiary basis for a finding of negligence on the part of respondent; and that judgment should, therefore, be entered for the respondent under the second principle set forth above. That this is plainly the rationale of the Supreme Court of Utah cannot be denied. After outlining the facts of this case, that court said:

> "On these facts it appears to us, that as a matter of law there was no negligence, and defendant's motion for a directed verdict should have been granted" (R. 69).

Concerning the right to trial by jury, the Utah Supreme Court made the following statement:

> "As to plaintiff's contention that denying recovery here denies him a constitutionally guaranteed jury trial, answer is found in the language of Mr. Justice Wolfe in a case decided by us* and in decisions of the United States Supreme Court** to the effect that no such deprivation occurs where the facts indisputably establish no right to relief" (R. 71).

The Utah Court was called upon to decide conscientiously whether or not there was any evidence of negligence upon the part of the respondent. The court held that there was not. Now, petitioner asks this Court to review the whole record in this case and to overrule the Utah court's conclusion in this regard. A decision by this Court, either agreeing with or disagreeing with such an appraisal of the evidence as has been made by the Supreme Court of Utah, would not materially affect the *principles* of the right to trial by jury. No consideration of the facts of this case by this Court is necessary to remind the Utah court of the nature of the right to trial by jury under the Federal Employers' Liability Act. *Butz* v. *Union Pacific R. Co.*, ... Utah ..., 233 P. 2d 332, defendant's petition for rehearing denied ... Utah..., 238 P. 2d 1128. Nor does such a consideration of the facts of this case by this court appear to be necessary to elucidate for anyone else the *principles* of trial by jury. Those principles have been fully discussed in recent decisions of this Court. To support this statement it scarcely seems necessary to augment the appendix to the opinion of Mr. Justice Douglas in the case of *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497, by adding to the list of such cases there recorded the several cases which have been decided by this Court since that list was compiled.

Petitioner's effort to invest this case with the aroma of majestic principles which must be protected by this Court is

*Raymond v. Union Pacific R. Co., 113 Utah 26, 191 P. 2d 137.

**Moore, Adm. v. Chesapeake & Ohio R. Co., supra; Eckenrode v. Pennsylvania R. Co., supra.

unwarranted. What petitioner seeks is nothing more and nothing less than the re-appraisal of the particular evidence of an isolated case which has already been reviewed by the five Justices of the Utah Supreme Court, who unanimously agreed that the evidence fell short of proving negligence on the part of respondent as a matter of law. That a writ of certiorari to gratify such a request should seldom, if ever, be granted is pointed out by the concurring opinion of Mr. Justice Frankfurter in the case of *Wilkerson* v. *McCarthy*, supra.

The last reason advanced by petitioner for granting a writ of certiorari in this case is totally without merit. Counsel suggest that this Court find in this case "an opportunity to establish a rule of causation under the Federal Employers' Liability Act" (Petitioner's brief, p. 20). At page 19 of his brief petitioner admits, however, that the Utah Supreme Court did not decide any question of causation in this case. His admission but reflects the fact (R. 57-71, inclusive). Certiorari could not possibly, therefore, be granted to review any decision of the Supreme Court of Utah adverse to petitioner on the subject of legal causation under said act because such a decision is non-existent. Section 5 of Rule 38 of this Court describes the character of the reasons which will be considered by the Court as sufficient for granting a writ of certiorari. It is to be noted that a foremost requirement in each of the three subsections of Section 5 of that rule is that the lower court has decided *something* about the issue to be reviewed. Counsel's specious attempt to interest this Court in granting a writ of certiorari to dispose of a question neither presented to, nor decided by, the Utah court libels the analytical faculties of this Court.

CONCLUSION

We respectfully submit that the Supreme Court of Utah did not err in its analysis of the evidence in this case and that it correctly decided that there was no evidentiary basis for a finding of negligence on the part of respondent. As heretofore pointed out, the remaining reasons assigned by petitioner for granting a writ of certiorari are plainly inadequate. Respondent therefore respectfully requests that the petition for a writ of certiorari be denied.

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INDEX

SUBJECT INDEX

	Page
PRELIMINARY STATEMENT	1
DUTY AND BREACH OF DUTY	2
PETITIONER'S RIGHT OF TRIAL BY JURY	5
CAUSE IN WHOLE OR IN PART	7

TABLE OF CASES CITED

Bailey v. Central Vermont Ry. Inc., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444	6
Stewart v. Baltimore & Ohio R. Co., 137 F. 2d 527	4
Wilkerson v. McCarthy et al., 336 U. S. 53, 69 S. Ct. 413	6

STATUTES CITED

45 U. S. C. A., Section 51	5

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 396

HARRY KIRK CREAMER,

Petitioner,

vs.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY, a Corporation,

Respondent.

PETITIONER'S REPLY BRIEF

Preliminary Statement

Respondent, in relating its version of the facts, has studiously avoided the impelling force of evidence which establishes that the task of manually icing diners involves extreme exertion and the resulting inference that such extreme exertion also involves a likelihood of injury to employees. Respondent has likewise glossed over the vitally important and uncontradicted evidence that mechanical devices were readily available, which were both practical and in common use on tracks a few steps from where petitioner was injured, which would have eliminated the severe exertion required by the task (R. 39, 57).

Respondent has suggested that petitioner and his co-employees could have chosen the size of the pieces of ice

they carried to the tops of diners. This is true, but must be considered in the light of other testimony that the 100-pound cakes of ice were customarily carried by workmen because cakes of that size could be handled with less likelihood of them slipping from the shoulders of workmen and possibly injuring other workmen or passengers walking along the platform below, and in any event the number of trips up the ladder would be increased and exertion not decreased (R. 24, 41, 42).

Respondent has suggested that petitioner had adequate time to complete the task of icing the three diners before the end of his shift. The question of time is not of substantial importance. Petitioner could not have been expected to so space his trips up and down the ladder with 100-pound cakes of ice that he would finish precisely at quitting time. In any event the question is whether the work, performed in haste or otherwise, involved extreme exertion, and the many workmen who testified on behalf of petitioner stated without exception that it did involve extreme exertion (R. 43, 44, 45, 47). Whether or not such exertion also involved a likelihood of injury was clearly a jury question. It is a matter of universal knowledge that extreme exertion injures countless people under countless circumstances.

Duty and Breach of Duty

Petitioner's case was presented to the jury under the sole claim that respondent was negligent in furnishing insufficient equipment for icing diners with safety; that such equipment was readily available in the form of lifting devices so that coach cleaners would not be required to manually carry ice to the tops of diners and thereby subject themselves to the likelihood of overexertion. Yet respond-

ent continues to insist that the sole and only duty owed was not to negligently assign a workman, known to have a physical weakness, to manually carry ice up the ladders, and the Supreme Court of the State of Utah has found favor with this contention.

It is probably true that the first workman from any group who suffers injury from overexertion will invariably be the one who has a known or unknown physical weakness. Respondent argues that such physical weakness is a shield to protect railroads from liability to an injured workman even though an assigned task involves unusual forms of exertion and even though practical equipment is readily available to eliminate such exertion from the task.

We submit that the duty owed by respondent was a broad duty, not just to those known to be physically handicapped, but to each and every member of the class of workmen performing the task of icing diners. It was owed to the strong, the weak, the old and the young alike. Its violation would depend on whether there was a foreseeable likelihood of injury to any member of the class from insufficiency of equipment, not just to petitioner and not just to "normal" or "ordinary"' members of the class which respondent regards as persons in perfect health. The question is not whether petitioner was "normal," but whether the assigned task of icing diners manually was unsafe.

Conditions of safety and unsafety are relative in nature and varying in degree. Unless a condition is in the area where reasonable minds cannot differ, questions of safety and unsafety are peculiarly for the jury. Eight jurors, with the trial court's approval, have already registered an opinion that icing diners by hand under the circumstances of this case involves likelihood of injury from overexertion.

The Supreme Court of the State of Utah has held as a matter of law that there was no likelihood of such injury. This extraordinary decision has been rendered in the teeth of evidence that icing three diners was extremely tiring; that one normal workman, who was of slight build, was physically incapable of icing three diners; that said task involved more extreme physical exertion than pitching hay, digging a trench, or hauling cement in a wheelbarrow; that it was the one task involving more extreme physical exertion than any other task performed in The Ogden Union Railway and Depot Company yards, and that such task had been performed daily by countless workmen over the years and that the overexertion required by insufficient equipment did in fact cause the injuries to plaintiff (R. 13, 43, 44, 45, 47).

This decision, if allowed to stand, will withdraw the right of trial by jury from a substantial number of workmen injured in the performance of tasks requiring unusual forms of overexertion and overstraining. In fact, it is difficult to conceive of a case of overexertion or overstraining injury where recovery would not be defeated by the principles the Utah Supreme Court has pronounced.

Respondent has undertaken to distinguish the case of *Stewart v. Baltimore & Ohio R. Co.*, 137 F. 2d 527, with the following statement: "The likelihood of injury to some employee in normal health who undertook the operation of such a switch was apparent. Accordingly, the case was for the jury." (p. 17). In the *Stewart* case there was evidence that a switch was stiff and difficult to throw. In this case there was evidence that icing diners manually was a strenuous task. In both cases, the likelihood of injury from overextertion was only present as a permissive inference. Stewart was not "normal" in the sense that he was a perfect specimen of manhood. His heart was af-

flicted with certain frailties and weaknesses. He succumbed to a coronary thrombosis. This would not have occurred had he been possessed of a perfect heart. If he had possessed a perfect heart but a weak abdominal wall, he may well have suffered a hernia. Would his case then have been any less meritorious? Is there any way to determine from a group of workmen which individual will be the first to succumb to a task involving extreme exertion, or which portion of his anatomy will be the first to give way? Frequently overstraining or overexertion is the very thing which makes a weakness manifest. Should this fact alter the character of a railroad's duty? We reaffirm that the *Stewart* case is indistinguishable either on fact or principle.

Many types of appliances and equipment have been devised and placed in common use for the purpose of hoisting and lifting. These devices have eliminated countless tasks involving extreme forms of physical exertion. 45 U.S.C.A., Section 51 expressly recognizes the carrier's duty to eliminate extreme forms of physical exertion by the furnishing of *sufficient* appliances and equipment. The Supreme Court of Utah has nevertheless held as a matter of law that respondent owed no such duty; that no such duty was breached, and that no injury was caused in whole or in part by respondent's negligent omission.

This decision has emasculated from the Federal Employers' Liability Act any meaning in the words "insufficiency, due to its negligence, in its * * * appliances, * * * or other equipment."

Petitioner's Right of Trial by Jury

The right of trial by jury has been declared many times to be "a basic and fundamental feature of our system of federal jurisprudence and is part and parcel of the remedy

afforded railroad workers under the Federal Employers' Liability Act." *Bailey v. Central Vt. Ry. Inc.*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444.

Respondent, in its brief, made the following statement concerning the subject of trial by jury (p. 19):

> "A decision by this Court, either agreeing with or disagreeing with such an appraisal of the evidence as has been made by the Supreme Court of Utah, would not materially affect the principles of the right to trail by jury."

But mere declarations of principle do not guarantee this right to the injured employee. Where doubtful questions of fact are taken from the jury by a hostile court the use of lofty language does not alter the fact that the right of trial by jury has been denied an American citizen. Of what use are principles unless they are upheld by the deeds of our courts?

Mr. Justice Douglas in his concurring opinion in the case of *Wilkerson v. McCarthy et al.*, 336 U.S. 53, 69 S.Ct. 413, 420, speaking of this Court's function in overturning decisions where doubtful questions of facts have been taken from the jury and resolved by lesser courts in favor of the employer, had this to say:

> "* * * Since the condition was one created by the Court and beyond effective control by Congress, it was appropriate and fitting that the Court correct it. *In fact, a decision not to correct it was to let the administration of this law be governed not by the aim of the legislation to safeguard employees but by a hostile philosophy that permeated its interpretation.*"

In the case at bar the Utah Supreme Court has again rendered lip service to the principles contained in con-

trolling decisions of this Court, but its decision has cast railroad employees' right of trial by jury into doubt and has renderd this Court's great pronouncements "as sounding brass, or a tinkling cymbal." Yet respondent would say that no important constitutional question is involved.

Cause in Whole or in Part

Respondent has suggested petitioner's contention that this Court should pronounce definite rules on the question of cause in whole or in part is without merit inasmuch as the question of causation has never been an issue. This argument is interesting in the light of respondent's statement in its brief (p. 5):

> "* * * this had happened solely because his heart was in a weakened condition when he commenced the work."

The Supreme Court of the State of Utah in its opinion stated:

> "It must be conceded that without the rheumatic heart, injury would not have resulted."

Respondent at one stage seems to argue that overexertion was not a cause in whole or in part of petitioner's injury, and then to argue that causation is not an issue in the case. Petitioner has consistently contended that no serious question of causation exists in view of Dr. J. G. Olson's convincing testimony that petitioner's heart failure was precipitated by "unusual and severe exertion" while manually icing diners (R. 30, 32). This contention has consistently been denied by respondent.

It has seemed to petitioner that in fairness to this Court he should meet fairly and squarely each and every issue concerning whether the jury was the proper tribunal to determine petitioner's right of recovery. Petitioner has in good faith undertaken to meet those issues and here reaffirms its position that this case affords an opportunity to establish a rule of causation under the Federal Employers' Liability Act, setting at rest speculation and conjecture as to the meaning of the words "cause in whole or in part" as used in the Federal Employers' Liability Act.

Respectfully submitted,

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